HOW DOES THE GOVERNMENT INTERACT WITH BUSINESS?: FROM HISTORY TO CONTROVERSIES

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> "We are all in the gutter, but some of us are looking at the stars."
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> ~ Oscar Wilde[1]

I. INTRODUCTION

The relationship between American government and American business is a vast topic of immeasurable complexity. In keeping with the timely and important theme of this Symposium, yet at the same trying to focus its line of inquiry, this Article first offers a brief survey of the relationship between government and business viewed through a regulatory lens. Using this history as backdrop, it then uses three illustrative doctrinal areas as symptomatic of how this relationship has become problematic and how it might be improved.

The piece is structured into two principal sections. Part I provides a historical overview of the history of regulation in America, as well as two new paradigms that have emerged in regulatory theory: the regulation of bottleneck inputs and cooperative federalism. Part II, the core of the Article, focuses on three controversial areas where the relationship between government and business has become problematic and is ripe for reform: corporate and securities law, antitrust and constitutional law. In each area, I point to problems in current legal arrangements, and suggest a path to reform.

II. HISTORY

I begin by offering an overview of the history of regulation in America, as well as a brief foray into two new approaches to regulation.

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[1] *See* BARTLETT'S FAMILIAR QUOTATIONS 566 (Justin Kaplan ed., Little, Brown, and Co. 1922) (1855) (quoting Oscar Wilde).

A. *Overarching Cyclicality*

Improving the relationship between American government and American business first requires an understanding of the history of this relationship. Rather than trying to cover every nuance of a vast waterfront, I begin by providing a brief perspective on the development of American regulatory policy[2]—both economic and social[3]—in four historical phases. The first phase, in the late nineteenth and early twentieth century, saw the birth of the earliest regulatory mandates. In the realm of economic regulation, the most notable example is the Interstate Commerce Commission, founded in 1887 to regulate the railroads,[4] and the regulation of civil aviation beginning with the Air Commerce Act of 1926.[5] The most prominent illustration with respect to social regulation was the formation of the Bureau of Chemistry in 1908 in response to scandals surrounding adulterated food and drugs.[6] The year 1890 saw the passage of the Sherman Act—the foundational statute in antitrust law that seeks to prevent

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[2] Regulation consists of direct public intervention in private contractual arrangements. *See, e.g.*, David P. Baron, *Design of Regulatory Mechanisms and Institutions, in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1349 (Richard Schmalensee & Robert D. Willig eds., 1989) ("Regulation involves government intervention in markets in response to some combination of normative objectives and private interests reflected through politics.").

[3] Typically, commentators have divided regulations somewhat loosely into "economic" regulations on the one hand, and "social" or "health, safety and environmental" regulations on the other. The former consists of regulating the practices of an entire industry—historically, this has involved "government-imposed restrictions on firm decisions over price, quantity, and entry and exit." W. KIP VISCUSI ET AL., ECONOMICS OF ANTITRUST AND REGULATION 297 (3d ed. 2000). Canonical examples involve the regulation of railroads, utilities, air transportation, or telecommunications. The latter type of regulation consists of rules designed to minimize the risks to citizens and consumers. Rather than regulating the behavior of an industry in total, social regulations are developed with regard to specific products or activities—whether it be food preparation, pharmaceutical development, workplace safety, environmental pollution, municipal building codes, and the like. *See* Howard K.Gruenspecht & Lester B. Lave, *The Economics of Health, Safety, and Environmental Regulation, in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1509, 1513 (Richard Schmalensee & Robert D. Willig eds., 1989).

[4] For a concise history of economic regulation, see VISCUSI ET AL., *supra* note 3, at 301–07.

[5] *See* Air Commerce Act of 1926, Pub. L. No. 69–254, 44 Stat. 568 (1926).

[6] *See, e.g.*, Gruenspecht & Lave, *supra* note 3, at 1509. The Bureau of Chemistry eventually transformed into the FDA in 1931. For a comprehensive timeline of the foundation and transformation of regulatory agencies, see Clifford Winston et al., *Explaining Regulatory Policy, in* 1994 BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 1 (Clifford Winston et al. eds., 1994).

collusion and monopoly—followed by the Clayton and Federal Trade Commission Acts of 1914.[7]

Despite these early forays into regulation, the contours of the modern regulatory state were defined only in the second phase—as a reaction to the excesses of the 1920s and the ensuing Great Depression.[8] Roosevelt's New Deal saw the creation of a number of prominent regulatory agencies, mostly in the realm of economic regulation. Examples fall into two categories. The first consists of those designed to make markets work better, such as the Federal Deposit Insurance Corporation (1933) to protect consumers from unscrupulous banks, and the Securities and Exchange Commission (1935) to reign in Wall Street's excesses. The second category of interventions sought effectively to manage industry-wide cartels; for example, the Federal Communications Commission (1934) to manage the nation's telephones and airwaves, and the Civil Aeronautics Authority (1938) to set airline rates. The 1930s were a significant decade in American regulatory policy not only due to the sheer volume of agencies created, but also because of the virtually unlimited faith progressive ideology placed in the expertise of these administrative bureaucracies.[9]

With World War II, the Korean War, and the economic expansion of the 1950s and early 1960s, few new regulatory mandates emerged. Antitrust enforcement, for its part, became increasingly strong, especially with respect to merger reviews—even prompting some commentators to speak of the emergence of a newly reinvigorated Sherman Act.[10] Yet the third phase only began with Lyndon Johnson's plans for a "Great Society" which brought expansion of social regulation in the mid-1960s. Ironically, the pace of new social regulation reached a feverish pitch during the otherwise conservative Nixon administration in the early 1970s. As Kip Viscusi chronicles:

> The decade of the 1970s marked the emergence of almost every major risk or environmental regulation agency. The U.S. Environmental Protection Agency [1970], the National Highway Traffic Safety Administration [1970], the Consumer Product Safety Commission [1973], the Occupational Safety and Health Administration [1972], and

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[7] *See* Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745, 763–64 (2004).

[8] *See* Alfred E. Kahn, *The Political Feasibility of Regulatory Reform, in* REFORMING SOCIAL REGULATION: ALTERNATIVE PUBLIC POLICY STRATEGIES 247, 251-52 (Le Roy Graymer & Frederick Thompson eds., 1982).

[9] *See, e.g.*, STEPHEN BREYER, REGULATION AND ITS REFORM 350–51 (1982).

[10] *See, e.g.*, Eugene V. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567 (1947); Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 78 ST. JOHN'S L. REV. 569 (2004).

> the Nuclear Regulatory Commission [1975] all began operation in that decade.[11]

Much of this social regulation still stands, at least in form. As the macroeconomic dislocations of the late 1970s set in, however, a fourth historical phase began—deeply critical of regulation and drawing intellectual legitimacy from the so-called "law and economics" movement.[12] Much of the economic regulation began unraveling, hastening in decades of loosened public oversight on the U.S. economy. Many formerly regulated industries—notably the transportation and telecommunications sectors—began to undergo dramatic change. As one of the pioneers of deregulation, Alfred Kahn, notes, "by 1981 the federal government would have deregulated or substantially deregulated trucking, the airlines, the railroads, and financial markets, and made some progress toward deregulating communications."[13] Ironically, while one might expect a deregulated marketplace to place greater emphasis on the importance of antitrust, antitrust enforcement waned during the 1970s and receded even more dramatically during the 1980s.[14]

How to summarize these twists and turns? While ascendant in the early part of the twentieth century, regulation has suffered a gradual decline in respectability over the past thirty years. As Paul Joskow and Nancy Rose summarize:

> The massive economic disruptions of the 1930s gave rise to a vast array of federal regulations, most of which persisted through the next forty years. The recent wave of federal regulatory reforms arose from the substantial supply shocks and macroeconomic disturbances of the 1970s, which have been characterized as the most severe disruptions since the 1930s. These reforms have dismantled or refigured much of the 1930s federal regulatory apparatus.[15]

In sum, we have witnessed a cycle of regulation and deregulation.

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[11] VISCUSI ET AL., *supra* note 3, at 637.

[12] For three seminal articles in this tradition, see Harvey Averch & Leland L. Johnson. *Behavior of the Firm Under Regulatory Constraint*, 52 AM. ECON. REV. 1052 (1962); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

[13] Kahn, *supra* note 8, at 247.

[14] *See, e.g.*, Lawrence A. Sullivan, *An Inquiry Into Antitrust, Intellectual Property, and Broadband Regulation as Applied to the "New Economy,"* 52 CASE W. RES. L. REV. 41, 47 (2001).

[15] Paul L. Joskow & Nancy L. Rose, *The Effects of Economic Regulation*, *in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1497 (Richard Schmalensee & Robert D. Willig eds., 1989).

B. *Innovation: Bottlenecks and Cooperative Federalism*

Beyond the overarching theme of cyclicality, at least some new regulatory paradigms have evolved. Two examples might give a flavor of the attempted innovation: substantively, confining regulation narrowly only to "bottleneck" elements within a system, and procedurally, experimenting with cooperative federalism as an alternative to either dual or preemptive federalism.

First, the locus of attention in economic regulation has moved increasingly away from setting retail rates and controlling the entry and exit of players, toward the narrow regulation of input "bottlenecks" that where it is prohibitively expensive for new entrants to compete with incumbents. The intellectual foundations of this idea were perhaps best developed in Stephen Breyer's pathbreaking book, *Regulation and Its Reform*, which suggested the metaphor of "less restrictive alternatives"[16] and laid out "a framework that sees classical regulation as a weapon of last resort and looks for less restrictive ways to deal with problems thought to call for regulation."[17] Breyer's paradigm proved to be quite prescient: as the 1980s and 1990s unfolded, technological innovation dramatically narrowed the scope of natural monopoly in a variety of industries. For example, long-haul telecommunications networks and the generation of electricity can now be separated from the last mile of local telephone and electricity wires—with competition possible on the former, regulation can be limited to the latter.[18]

This new approach allows competition to flourish in the non-bottleneck portions of the network, while protecting consumers from monopoly rents in the bottleneck portions. William Rogerson echoes Breyer's suggestion when he points out that "[r]egulating narrowly defined inputs instead of outputs is one approach regulators can use to attempt to confine regulation to as small a sphere as possible, and thereby allow the benefits of competition to infuse more segments of an industry."[19] The idea of regulating critical inputs narrowly has been applied in a variety of industries, including energy, transportation and telecommunications.[20] To

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[16] BREYER, *supra* note 9, at 341.

[17] *Id.* at 368.

[18] *See, e.g.*, Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 YALE L.J. 417 (1999).

[19] William P. Rogerson, *The Regulation of Broadband Telecommunications, the Principle of Regulating Narrowly Defined Input Bottlenecks, and Incentives for Investment and Innovation*, 2000 U. CHI. LEGAL F. 119, 135 (2000).

[20] *See, e.g.*, Curtis Grimm & Clifford Winston, *Competition in the Deregulated Railroad Industry: Sources, Effects, and Policy Issues*, *in* DEREGULATION OF NETWORK INDUSTRIES 41, 46 (Sam Peltzman & Clifford Winston eds., 2000); Paul

be sure, there is significant work to be done—notably determining what to unbundle and at what price[21]—but the idea represents a paradigm shift in economic regulation.[22]

A second innovation, more procedural in nature, has been the advent of cooperative federalism—an attempt to find a middle ground between "'preemptive federalism' that relies primarily or exclusively on federal courts or administrative agencies to develop unitary and pinpointed federal policies . . . [and] 'dual federalism' that leaves the states as autonomous actors separated from the federal government."[23] In their usual incarnation, cooperative federalism programs "set forth some uniform federal standards—as embodied in the statute, federal agency regulations, or both—but leave state agencies with discretion to implement the federal law, supplement it with more stringent standards and, in some cases, receive an exemption from federal requirements."[24] Cooperative federalism has been used in a variety of regulatory contexts where state agencies implement federal mandates: environmental law, telecommunications and social

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L. Joskow, *Restructuring, Competition and Regulatory Reform in the U.S. Electricity Sector*, 11 J. ECON. PERSP. 119, 120 (1997); Eli M. Noam, *Will Universal Service and Common Carriage Survive the Telecommunications Act of 1996?*, 97 COLUM. L. REV. 955, 956 (1997).

[21] *See, e.g.*, William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 YALE J. ON REG. 171 (1994).

[22] Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1361–62 (1998) ("If one conceives of the regulator under the original paradigm as a sort of ice cap, covering all aspects of the regulated industry, then the objective under the new paradigm is to melt away the sphere of regulatory oversight to the smallest industry segment possible—the so-called bottleneck monopoly.").

[23] Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1693 (2001) [hereinafter Weiser, *Cooperative Federalism*]. As Weiser elaborates:

> In contrast to dual federalism, cooperative federalism envisions a sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law . . . . Significantly, these programs neither leave state authority unconstrained within its domain, as would a dual federalism program, nor displace such authority entirely with a unitary federal program, as would a preemptive federalism . . . . By crafting a middle ground solution between the extremes of dual federalism and preemptive federalism, Congress continues to outstrip existing constitutional rhetoric, which envisions a separation that does not exist in practice.

Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 664–65 (2001).

[24] Weiser, *Cooperative Federalism*, *supra* note 23, at 1696.

services, to name a few.[25] To be sure, there are many unanswered questions, including the appropriateness of states creating federal common law, as well as possible non-delegation and anti-commandeering concerns.[26] Nonetheless, much like the move to limit the scope of economic regulation to bottleneck inputs, cooperative federalism represents a novel approach to regulation—above and beyond the overarching message of historical cyclicality.

III. CONTROVERSIES

With this history as a backdrop, I propose focusing on three contemporary, and controversial, topics to illustrate areas where the relationship between government and business has become problematic. In each area, I question current legal arrangements, and propose a path to reform.

A. *Securities Layering*

One might expect corporate law to protect shareholders against abuses by corporate insiders. Unfortunately, though, corporation statutes and fiduciary duties offer precious little protection to shareholders. State corporation codes provide the underlying statutory framework for corporations. These statutes, however, are generally nothing more than a series of default provisions around which management and shareholders can theoretically contract. As Mark Roe notes, these codes reflect the belief that "the corporate law is, or should be, the contract that investors and managers want"[27]—within this mindset, "[c]ontract law seems good, and corporate law, which also seems good, is in many dimensions a special form of contract law."[28] In the corporate law vernacular, we live in a world of "enabling statutes."[29]

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[25] *See, e.g.*, Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552 (1999); Robert L. Fischman & Jaelith Hall-Rivera, *A Lesson for Conservation from Pollution Control Law: Cooperative Federalism for Recovery under the Endangered Species Act*, 27 COLUM. J. ENVTL. L. 45 (2002); Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1 (1999).

[26] *See* Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463 (2000).

[27] Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491, 2496 (2005).

[28] Mark J. Roe, *Corporate Law's Limits*, 31 J. LEGAL STUD. 233, 262 (2002).

[29] Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?*, 21 OXFORD REV. ECON. POL'Y 212, 216 (2005) ("State corporate law is in essence enabling, following a menu approach that permits firms to alter statutory defaults to fit their needs.").

For their part, fiduciary duties in corporate law—putatively the duties of care and loyalty, the waste doctrine, and duties of candor and good faith—are in fact little more than eloquent rhetorical flourish. Courts have watered down the duty of care through the "business judgment rule" (BJR) which presumes that "in making a business decision the directors of a corporation acted on an informed basis . . . and in the honest belief that the action taken was in the best interests of the company."[30] The BJR "operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation."[31] In effect, the BJR shifts the duty of care from negligence to gross negligence: violations are found only where there is "reckless indifference to or a deliberate disregard of the whole body of stockholders" [32] or "actions which are without the bounds of reason.[33] Put simply, the current duty of care is anemic at best. As one commentator summarizes:

> A director is only liable if he or she is grossly negligent, and the rule presumes that the director acted with due care . . . . If the company has an exculpatory provision in its articles of incorporation, as nearly all publicly-held corporations do, the plaintiff-shareholder must prove that the director failed to act in good faith or intentionally harmed the corporation. As if these legal standards were not enough to reduce a director's incentives to act with care, directors invariably have indemnification rights and insurance, and courts have limited the ability of shareholders to obtain discovery in derivative actions alleging director misconduct.[34]

The duty of loyalty can have a little more bite, but not much. While corporate law allows self-dealing transactions,[35] the duty of loyalty "mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer, or controlling shareholder and not shared by the stockholders generally."[36] Savvy insiders, however, recognize the way around this duty: approval from an "independent" body—shareholders or the board, or even a committee composed of "disinterested" board members. Some corporate codes even

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[30] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).
[31] Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993).
[32] Allaun v. Consol. Oil Co., 147 A. 257, 261 (Del. Ch. 1929).
[33] Gimbel v. Signal Cos. Inc., 316 A.2d 599, 615 (Del. Ch. 1974).
[34] Mark J. Loewenstein, *The Quiet Transformation of Corporate Law*, 57 SMU L. REV. 353, 377–78 (2004).
[35] *See, e.g.*, Joseph T. Walsh, *The Fiduciary Foundation of Corporate Law*, 27 J. CORP. L. 333, 334 (2002) ("[T]he decisional law has recognized a relaxation of the rigor of trust law, primarily with respect to tolerance of self-dealing transactions.").
[36] *Cede & Co.*, 634 A.2d at 361.

provide so-called "strong" safe harbor statutes immunizing approved transactions from any fairness inquiry;[37] more importantly, jurisdictions such as Delaware that scrutinize such approved transactions for fairness,[38] nonetheless employ a loose standard.[39]

Other duties—waste, candor, and good faith—are even weaker. Showing "waste" is an unusually difficult hurdle to clear, since plaintiffs must prove "an exchange that is so one sided that no business person of ordinary, sound judgment could include that the corporation has received adequate consideration."[40] The duty of candor (or disclosure)—which at least according to one Delaware case "obligates directors to provide the stockholders with accurate and complete information material to a transaction or other corporate event that is being presented to them for action"[41]—is unlikely to be an independent duty at all, since it derives merely "from the combination of the fiduciary duties of care, loyalty, and good faith."[42]

Thus, to the extent that the duty of good faith can even be categorized as a separate duty, it too devolves into the procedural tricks of care and loyalty.[43] In addition, recent Delaware case law suggests that to be held liable, plaintiffs must show that defendants intentionally acted in bad faith.[44] Thus, to the extent an independent duty of good faith even exists, proving it has become difficult. The big picture that emerges is thus one filled with rhetoric but low on substance. Empirical evidence even suggests that investors "seem to consider the Delaware courts' decisions to be inconsequential as regards shareholders' wealth and, by implication, largely

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[37] *See, e.g.*, REV. MODEL BUS. CORP. ACT § 8.61 (2002).
[38] *See, e.g.*, DEL. CODE ANN. tit. 8, § 144 (2004).
[39] *See, e.g.*, Cookies Food Prod., Inc. v. Lakes Warehouse Distrib., Inc., 430 N.W.2d 447 (Iowa 1988);); *In re* Wheelabrator Tech., Inc. S'holders Litig., 663 A.2d 1194 (Del. Ch. 1995); Cooke v. Oolie, No. Civ. A. 11134, 1997 WL 367034 (Del. Ch. June 23, 1997.
[40] Glazer v. Zapata Corp., 658 A.2d 176, 183 (Del. Ch. 1993).
[41] Malone v. Brincat, 722 A.2d 5, 10 (Del. 1998).
[42] *Id.* at 11.
[43] *Cf. In re* The Walt Disney Co. Derivative Litig., 907 A.2d 693, 753 (Del. Ch. 2005) ("Decisions from the Delaware Supreme Court and the Court of Chancery are far from clear with respect to whether there is a separate fiduciary duty of good faith.").
[44] *See id.* at 755 ("[T]he concept of *intentional dereliction of duty, a conscious disregard for one's responsibilities*, is an appropriate (although not the only) standard for determining whether fiduciaries have acted in good faith."). Indeed, if good faith were read broadly, it would eviscerate the exculpation provisions in Delaware § 102(b)(7), which does not protect defendants who either violate the duty of loyalty or act in bad faith. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2004).

indeterminate of the outcome of future cases."[45] As Ed Rock chronicles in his detailed study of how Delaware corporate law is actually created:

> [T]he Delaware courts generate in the first instance the legal standards of conduct (which influence the development of the social norms of directors, officers, and lawyers) largely through what can best be thought of as "corporate law sermons." . . . *[W]e come much closer to understanding the role of courts in corporate law if we think of judges more as preachers than as policemen.*[46]

Rock argues "that we should understand Delaware fiduciary duty law as a set of parables or folktales of good and bad managers and directors, tales that collectively describe their normative role."[47]

In the end, precious little is left of judicial review:

> Over time, state courts interpreted the [fiduciary] duties in a manner that left little substance. The business judgment rule and universal adoption of waiver of liability provisions all but eliminated causes of action for breach of the duty of care. The duty of loyalty, particularly self-dealing by officers and directors, could be validated through procedural mechanisms. With proper procedures, the fairness of the transaction was not subject to judicial review. This approach allowed self-dealing by officers and directors almost without limits.[48]

Weak fiduciary duties parallel empty statutes: they create the veneer of regulation and substantive review, respectively, but ultimately provide an empty core upon which to base corporate governance and protect shareholders.

In a monumental irony, the core of corporate law runs the risk of becoming irrelevant to debates on corporate governance. After all, as scandals have erupted, policymakers have added a series of layers, most notably the federal securities laws—rather than reexamine why the core of corporate law is empty. Critics most famously lament the incursion of the

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[45] Elliott J. Weiss & Lawrence J. White, *Of Econometrics and Indeterminacy: A Study of Investors' Reactions to "Changes" in Corporate Law*, 75 CAL. L. REV. 551, 603 (1987).

[46] Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997) (emphasis added).

[47] *Id.* at 1106.

[48] J. Robert Brown, Jr., *The Irrelevance of State Corporate Law in the Governance of Public Companies*, 38 U. RICH. L. REV. 317, 318–19 (2004) (citations omitted).

Sarbanes-Oxley Act of 2002 (SOX) into corporate governance.[49] Contrary to the conventional wisdom, however, SOX is not a watershed: significant federal layering has been going on for decades. As Mark Roe has shown in a series of articles, SOX is just the latest in an array of federal incursions, which include the Securities Act of 1933 and Exchange Act of 1934, the Williams Act, and the Foreign Corrupt Practices Act.[50] Roe concludes that:

> In nearly every decade of the twentieth century, the decade's major corporate law issue either went federal or federal authorities threatened to take it over—from early twentieth-century merger policy, to the 1930s securities laws, to the 1950s proxy fights, to the 1960s Williams Act, to the 1970s going-private transactions.[51]

The layers that Roe describes have arguably benefited shareholders. Other layers, notably the triad of securities reform statutes enacted from 1995 to 1998—the Private Securities Litigation Reform Act (PSLRA), the National Securities Market Improvement Act (NSMIA), and the Securities Litigation Uniform Standards Act (SLUSA)[52]—have been even more pro-management than state securities laws.[53] And federal layering has not exclusively been through statutes and regulations. Federal courts, led by the U.S. Supreme Court, have played an important historical role in fashioning common law remedies, most famously through the federal common law remedy of implied private rights of action for plaintiffs alleging fraud or misrepresentation.[54] As Robert Thompson points out, "[m]assive additions to federal statutes and regulations, and important governance modifications by self-regulatory organizations, such as the New York Stock Exchange's changes to its listing requirements, have completely

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[49] Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1523 (2005).

[50] Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 611–16 (2003); Roe, *supra* note 27, at 2520–23.

[51] Roe, *supra* note 27, at 2498.

[52] For a concise description of these laws, see Lander v. Hartford Life & Annuity Ins. Co., 251 F.3d 101, 107–09 (2d Cir. 2001).

[53] For a discussion of the differences between state corporate and state securities laws, see David L. Ratner, *The SEC at Sixty: A Reply to Professor Macey*, 16 CARDOZO L. REV. 1765, 1769 (1995).

[54] The landmark case is *Borak*, where the Court implied a private right of action under SEC Rule 14a-9 for false or misleading proxies. J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964). Beginning in the early 1970s, however, implied rights of action have become less expansive. *See, e.g.*, Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977); Cort v. Ash, 422 U.S. 66 (1975) (espousing a narrower purview for federal common law based on federalism concerns).

overshadowed any response of state law, the traditional source of corporate law in the United States."[55]

Whenever scandals have shown corporate doctrine to be inadequate, policymakers have seemingly made a curious choice. Rather than reexamine why enabling statutes and standard fiduciary duties are inadequate, lawmakers have added a series of layers—bandages designed to stem blood from the most recent corporate impropriety or scandal. A monumental irony has tragically ensued: on the one hand, there are layers of regulation everywhere; on the other, problems fester and scandals repeatedly erupt.

Perhaps conveniently, layers hide the hollowness of basic corporate law.[56] The layers—the bandages—shift attention away from the underlying problem: the empty core. To become relevant again, corporate law must first be de-layered and simplified. Corporate doctrine must deemphasize the business judgment rule, and embrace robust fiduciary duties.[57] As I have argued in detail elsewhere, perhaps this reform can be achieved using insights from cooperative federalism: the federal government can set a minimum floor, yet require implementation through state courts using a reverse-*Erie* principle.[58] Unless systemic reform occurs, the next scandal will bring yet another reactive bandage, unwittingly setting the stage for future scandals. The perennial vicious cycle will continue.

B. *Anemic Antitrust*

Having fallen victim to the harsh critiques of the Chicago[59] and public choice[60] schools, antitrust has been in decline for over thirty years. As one

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[55] Robert B. Thompson, *Corporate Governance After Enron*, 40 HOUS. L. REV. 99, 100 (2003).

[56] *Cf. id.* at 102 ("[T]he response in state corporate law has been largely one of silence that has left any modifications in corporate governance to . . . other actors.").

[57] *See, e.g.*, Franklin A. Gevurtz, *The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?*, 67 S. CAL. L. REV. 287 (1994); Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL'Y REV. 265, 280 (1998).

[58] *See* Reza Dibadj, *From Incongruity to Cooperative Federalism*, 40 U.S.F. L. REV. 845 (2006).

[59] *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX 408 (1978) (noting that antitrust exhibits "the paradox of great popularity and vigorous enforcement coupled with *internal contradiction and intellectual decadence*") (emphasis added); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 3 (1984) (lamenting that "the history of antitrust is filled with decisions that now seem blunders").

commentator sums it up, "[i]ts fervor fading, its doctrines fraying, antitrust is becoming a religion without a cause."[61] But how has antitrust law—once heralded by the United States Supreme Court as "the Magna Carta of free enterprise [and] as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms"[62]—descended into this mess?

The root of the problem is that antitrust has lost sight of its goal: consumer welfare.[63] Remarkably, through a curious and often overlooked sleight of hand, the Chicago school has brilliantly managed to redefine consumer welfare as allocative efficiency. Robert Bork, for instance, believes that the "closer the members of the industry come to maximizing their profits, the closer they come to maximizing the welfare of consumers"[64] since it is an "obvious fact that more efficient methods of doing business are as valuable to the public as they are to businessmen."[65] Indeed, for him, the "whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare."[66] Similarly, Frank Easterbrook cleverly equates efficiency with consumer

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[60] *See, e.g.*, Fred S. McChesney & William F. Shughart II, *The Unjoined Debate*, *in* THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE 341 (Fred S. McChesney & William F. Shughart II eds., 1995) ("[I]t is commonly recognized that antitrust has failed.").

[61] Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1512–13 (1984).

[62] United States v. Topco Assocs., 405 U.S. 596, 610 (1972). *See also* Nat'l Coll. Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 n.27 (1984) (quoting N. Pac. R.R. Co. v. United States, 356 U.S. 1, 4–5 (1958)) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.").

[63] *See* Nat'l Coll. Athletic Ass'n, 468 U.S. at 107; Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

[64] BORK, *supra* note 59, at 97.

[65] *Id.* at 4.

[66] *Id.* at 91. As Robert Lande observes:

> Judge Bork asserts that the sole purpose of the Sherman Act was enhancement of "consumer welfare" a term of art . . . This view of "consumer welfare" includes maximum economic efficiency but excludes anything giving preference to consumers over monopolists or any concern with "unfair" transfers of wealth from consumers to monopolists.

Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 84 (1982).

welfare,[67] and Richard Posner extols the virtues of efficiency, even suggesting that the "small businessman usually is helped rather than hurt by monopoly."[68] Perhaps most stunning is the lack of any empirical evidence to support these sweeping claims.

While rhetorically masterful,[69] such logic leaves much to be desired. As Eleanor Fox and Lawrence Sullivan amusingly describe:

> [T]he Chicago School defines competition in terms of efficiency; defines efficiency as the absence of inefficiency; defines inefficiency in terms of artificial output restraint; and thus concludes that any activity that does not demonstrably limit output is efficient and therefore procompetitive. Thus, it "proves" that almost all business activity is efficient—a neat trick.[70]

Put simply, if one believes "all business activity is efficient" then there is precious little role for antitrust. Unfortunately, such theorizing ignores the reality that while economists generally consider competition to be beneficial since it forces resources to be allocated to their most efficient use,[71] for a self-interested business, competition means lower profits.[72] In

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[67] *See* Frank H. Easterbrook, *Does Antitrust Have a Comparative Advantage?*, 23 HARV. J.L. & PUB. POL'Y 5, 6 (1999) ("Modern antitrust law thus is a search for economic explanations of problematic conduct. If the explanations show the conduct *efficient—and therefore ultimately to consumers' benefit*—then the court stays its hand; if not, the court condemns the conduct.") (emphasis added).

[68] RICHARD A. POSNER, ANTITRUST LAW 2 (2d ed. 2001).

[69] As Robert Skitol notes, "[w]hile Chicago School adherents trumpeted their support of 'consumer welfare,' they used that term in a counterintuitive manner to mean overall economy-wide efficiency rather than the protection of consumers as a class distinct from producers or a producer's shareholding owners." Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 CORNELL J.L. & PUB. POL'Y 239, 249 (1999).

[70] Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 959 (1987) (citation omitted). *See also* Eleanor M. Fox, *What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 ANTITRUST L.J. 371, 379 (2002) ("The 1980s victory of the Chicago School was more a victory of economic libertarianism and political conservatism than of maximization of a microeconomic welfare function.").

[71] *See, e.g.*, Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CAL. L. REV. 1005, 1006 (1987) ("One might describe these goals as the 'benefits' that can flow from workable competition, namely (1) prices close to incremental costs, leading to buying and production decisions that minimize economic waste, (2) efficient production processes, and (3) innovation as to both product and production process.").

the candid words of one article in the business press, "[b]usinessmen, by and large, don't like free and open markets. From John D. Rockefeller on, they have found markets to be messy, chaotic, and insufficiently profitable."[73] As such, the point is simple: government has a role to play—through the antitrust laws—to ensure competitive markets.

Regrettably, anemic antitrust has engendered pernicious consequences: two obvious and two subtle. First, policymakers have stood by and condoned the creation of large corporate behemoths in industries as diverse as financial services, airlines, telecommunications, and computer hardware and software.[74] A recent and leading antitrust monograph even declares that the "very ubiquity of merger-created efficiencies is why we evaluate mergers under a fairly benign set of rules."[75] There is no discussion, however, of what these "efficiencies" are and whether they will be passed onto consumers. Sadly enough, one is hard-pressed to find cases where industry concentration has actually helped consumers: it is no coincidence that consumer advocates tend to oppose mergers.[76]

Second, and occasionally following from the first, is that these companies become so gargantuan that they become "too-big-to-fail" (TBTF)—a brilliant way to internalize profits when things go well, and externalize costs when they do not. When the putative synergies of expensive acquisitions do not pan out, macroeconomic conditions deteriorate, or scandals grow out of control, taxpayers come to the rescue. Even though they seem small by the size of today's interventions, in the 1980s taxpayers were asked to avenge the savings and loan industry's death through a $150 billion bailout,[77] and in the 1990s the Federal Reserve marshaled financial institutions to provide nearly $4 billion to bailout the investment fund Long-Term Capital Management.[78] With respect to our current crisis, consider that financial actors were chasing higher returns in areas such as subprime lending and the trading of esoteric financial instruments—to belabor the obvious, any profits made from these activities

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[72] Indeed, in the theoretical case of "*long run competitive equilibrium, firms earn zero economic profits.*" KEITH N. HYLTON, ANTITRUST LAW 9 (2003).
[73] Alan Murray, *Exile on G Street: Bush's Economists Play Peripheral Role*, WALL ST. J., May 13, 2003, at A4.
[74] *See, e.g.*, Reza Dibadj, *Deregulation: A Tragedy in Three Acts*, WASH. POST, Sept. 13, 2003, at A21; Gary Minda, *Antitrust at Century's End*, 48 SMU L. REV. 1749, 1769 (1995).
[75] HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 219 (2005).
[76] *See, e.g.*, *Deregulated*, CONSUMER REP., July 2002, at 30.
[77] *See, e.g.*, Bob Keefe, *Some Not Ready to Toss Lifelines to All Those Ailing*, ATLANTA J. & CONST., Oct. 5, 2001, at A8.
[78] *See, e.g.*, Peter Coy, *How the Game Was Played—And Why Long-Term Lost*, BUS. WK., Oct. 12, 1998, at 41.

would belong to them. All this might be fine as far as it goes, provided of course that the financial actors also suffer any losses they may incur from their risky escapades. Yet instead, when things have gone wrong, these seemingly sophisticated actors instead turn to the federal government for a handout, on the theory that they are simply TBTF.[79] To add insult to injury, taxpayers are unwittingly funding the next round of consolidation—to the extent bailout money is used for mergers and acquisitions, the actors in the next crisis will be even bigger and more destabilizing.

The culminating affront here, of course, is that it is the individual—the ordinary taxpayer who might have already suffered mightily as shareholder and consumer—who is asked to be the insurer of last resort. Legal critics Alan Freeman and Elizabeth Mensch point to the stunning inconsistency:

> Conventional free-market ideology extols the virtues of private capital accumulation, entrepreneurial skill, and the harsh reality of risk. Yet tax breaks are granted to entice industries to invest or remain in localities. Cities compete for the opportunity to provide sports teams with ever more luxurious stadiums. Huge companies get government help when they face financial ruin. *Private companies rarely turn down the opportunity to feed greedily at the public trough.*[80]

Lax antitrust has thus brought with it a peculiar absurdity: the public as benefactor of last resort, as already-suffering taxpayers reallocate resources precisely to those corporations that were imprudent in the first place. Above all, TBTF facilitates hypocrisy: extol the virtues of free markets and private profits, then conveniently come begging to government to socialize the losses.

Beyond these two rather obvious implications that emerge from weakened antitrust, two more subtle realities emerge. The first is a missed opportunity for economic regulation and antitrust to learn from each other and develop common analytical tools. For instance, on the one hand, economic regulation struggles with how to regulate bottleneck inputs;[81] on the other, antitrust law has developed the "essential facilities" doctrine

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[79] Quite interestingly, approximately three years prior to the start of the most recent financial crisis, two Federal Reserve officials argued that the TBTF scenario would apply to several banks: their collapse would so harm the overall economy, that government would have no choice but to bail them out. *See* Gary H. Stern & Ron Feldman, *Big Banks, Big Bailouts*, WALL ST. J., Jan. 27, 2004, at A14.

[80] Alan Freeman & Elizabeth Mensch., *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237, 249 (1987) (emphasis added).

[81] *See supra* notes 16–22 and accompanying text.

which could be applied to the bottleneck problem.[82] After all, like bottlenecks, essential facilities tend to be "capital assets that cannot be economically duplicated given the size of the market—a communications network, a central terminal facility, stadium, or energy transmission facilities."[83] Scholars who see this connection have argued, for example, that regulators would improve their lot by becoming "limited-jurisdiction enforcer[s] of antitrust principles, applying a version of the 'essential facilities' doctrine in a single industry,"[84] or that "academics and practitioners ought to be searching for ways to define and limit the obligation to deal with competitors. Ultimately, the best way to accomplish this is to use a narrowly defined essential facilities doctrine as the sole foundation for imposing such a duty."[85] Yet despite these insights, the essential facilities doctrine—roundly criticized by many commentators[86]—currently inhabits the fringes of a diminished antitrust law.[87]

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[82] The "essential facilities" doctrine carves out an exception to the general rule that a firm has no obligation to deal with its competitors by stating that under certain circumstances, a refusal to deal is subject to a monopolization claim under § 2 of the Sherman Act. For an overview of the doctrine, see ROBERT PITOFSKY, THE ESSENTIAL FACILITIES DOCTRINE UNDER UNITED STATES ANTITRUST LAW (2002), *available at* http://www.ftc.gov/os/comments/intelpropertycomments/pitofskyrobert.pdf. The clearest judicial articulation of the doctrine is in *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co*, where the United States Court of Appeals for the Seventh Circuit developed a four-part test that must be met to invoke the essential facilities doctrine. The test consists of showing "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1132–33 (7th Cir. 1983).

[83] Glen O. Robinson, *On Refusing to Deal with Rivals*, 87 CORNELL L. REV. 1177, 1207 (2002).

[84] Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1361 (1998) (citation omitted).

[85] Robinson, *supra* note 83 at 1203 (emphasis omitted).

[86] *See, e.g.*, HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 305 (2d ed. 1999) ("The antitrust world would almost certainly be in a better place if it [the essential facilities doctrine] were jettisoned."); Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 841 (1990) (arguing essential facilities is "less a doctrine than an epithet"); Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 397–402 (1986) (calling the doctrine one of "dubious character" and "embarrassing weakness").

[87] *See* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 428 (1999) (Breyer, J., concurring) ("[T]he provision describing which elements must be unbundled does not explicitly refer to the analogous 'essential facilities' doctrine (an antitrust doctrine that this Court has never adopted) . . . .").

Second, and equally subtly, anemic antitrust has facilitated the ability of deregulators to pass the buck. To begin with, consider that it is all too easy for those enamored of deregulation to argue that industry concentration is not a regulatory problem per se; after all, reigning in big or powerful companies is antitrust's job. For example, Alfred Kahn correctly notes that "deregulation permits a fuller exploitation of monopoly power[,]"[88] adding that "[w]hile prepared to defend enthusiastically the deregulations with which I have been involved, I feel equally strongly that they have greatly accentuated the importance of antitrust enforcement."[89] Even a casual glance at the economic history of the past half century, however, reveals a similar pattern: a push for deregulation coupled with the clever argument that the antitrust laws would protect competition, followed precisely by the creation of oligopolistic behemoths in a range of industries from airlines to financial services. We regrettably live in an era where policymakers and pundits can conveniently avoid responsibility whenever deregulation goes awry simply by sloughing off responsibility to lax antitrust enforcement—like the child's game of "hot potato."

What permits this game? Historically, antitrust and regulation have been bifurcated, and remain so in the minds of prominent observers. Stephen Breyer, for example, draws a contrast between "private anticompetitive behavior,"[90] the domain of antitrust, and "market failure[s]"[91] which call for regulation:

> The antitrust laws seek to create or maintain the *conditions* of a competitive marketplace rather than replicate the *results* of competition or correct for the defects of competitive markets. In doing so, they act negatively, through a few highly general provisions *prohibiting* certain forms of private conduct. They do not affirmatively order firms to behave in specified ways; for the most part, they tell private firms what not to do.[92]

Herbert Hovenkamp notes that as markets "pass out of the realm of strict agency control and into the realm of private, market-based decision

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[88] Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. ON REG. 325, 338 (1990).

[89] Alfred E. Kahn, *Deregulatory Schizophrenia*, 75 CAL. L. REV. 1059, 1059 (1987). *See also* ALFRED E. KAHN, LESSONS FROM DEREGULATION: TELECOMMUNICATIONS AND AIRLINES AFTER THE CRUNCH 47(2004) ("Deregulation shifts the major burden of consumer protection to the competitive market, and therefore, in important measure, to the enforcement of the antitrust laws.").

[90] *See* BREYER, *supra* note 9, at 160.

[91] *See id.*

[92] *Id.* at 156–57.

making, *antitrust picks up where the regulatory regime leaves off*."[93] Paul Joskow warns how "[e]fforts to mix antitrust policies designed to promote competition with regulatory policies that restrict it can cause numerous difficulties."[94]

A new and different perspective is to recognize that "[a]ntitrust is nothing if not economic regulation,"[95] and that the "attempt to draw a sharp demarcation between antitrust and regulatory objectives is a mistake."[96] Indeed, instead of relying on retail rate regulation, regulators are increasingly trying to create an environment where competition can flourish.[97] More generally, as Thomas Moore points out, "[t]he Sherman Act . . . [is] the most encompassing regulatory statute and the second oldest federal regulatory law . . . . Only recently have economists begun to recognize that the antitrust laws are regulatory statutes."[98]

The advantages of bucking the conventional wisdom should hopefully be apparent. First, a new bridge between these two traditionally distinct areas of policy allows the development of common analytical tools. As William Baumol and Gregory Sidak observe:

> This harmony between regulation and antitrust has three important implications. First, the same basic tools of microeconomic analysis can be employed in one as in the other . . . . Second, changes in technology or other circumstances that permit natural monopoly to give way to competition impart continuity to the relationship between economic regulation and antitrust. Third, many of the thorniest problems in antitrust law . . . are fundamentally regulatory in nature, involving issues such as entry or the pricing of intermediate goods sold to competitors. Thus,

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[93] Herbert Hovenkamp, *The Areeda-Turner Treatise in Antitrust Analysis*, 41 ANTITRUST BULL. 815, 832 (1996) (emphasis added).

[94] Paul L. Joskow, *Mixing Regulatory and Antitrust Policies in the Electric Power Industry: The Price Squeeze and Retail Market Competition*, *in* ANTITRUST AND REGULATION 173 (Franklin M. Fisher ed., 1985).

[95] George Bittlingmayer, *The Economic Problem of Fixed Costs and What Legal Research Can Contribute*, 14 LAW & SOC. INQUIRY 739, 744 (1989).

[96] Robinson, *supra* note 83, at 1184.

[97] *See, e.g.*, Kearney & Merrill, *supra* note 84, at 1361 ("[U]nder the new paradigm, the regulator plays a far more limited role. Instead of comprehensively overseeing an industry in order to protect the end-user, *its principal function is to maximize competition among rival providers, in the expectation that competition will provide all the protection necessary for end-users*.") (emphasis added).

[98] Thomas Gale Moore, *Introduction* to Antitrust and Economic Efficiency: A Conference Sponsored by the Hoover Institution, 28 J.L. & ECON. 245, 245 (1985).

> the economic scholarship on regulation can in many instances enrich antitrust jurisprudence.[99]

Put more starkly, "antitrust and regulation . . . strike the same rocks."[100] Second, and perhaps even more importantly, if antitrust and regulation are viewed holistically, it becomes more difficult for regulatory pundits to pass the buck when things go awry. Responsibility just might breed reform.

In the end, as a leading monograph reminds us, antitrust "is a far humbler enterprise today than it was several decades ago."[101] Regrettably, the current ethos has lost sight of the fact that antitrust "was premised upon a political judgment that decentralized market power was essential to a free society."[102] To achieve this overarching goal, the antitrust enterprise could afford a little less modesty.

C. *Constitutional Deregulation?*

The use of constitutional rhetoric to push back government regulation is, of course, not new—perhaps most famously, *Lochner* invalidated a New York state law seeking to regulate working conditions based on the Due Process Clause of the Fourteenth Amendment.[103] After a decades-long relative dormancy, using the Constitution to invalidate regulation is once again in vogue, as perhaps best evidenced by cases where the United States Supreme Court has recently granted certiorari. The strategy comes in various flavors. For example, some litigants have tried to undermine the Sarbanes-Oxley Act (SOX) by arguing that the Public Company Accounting Oversight Board (PCAOB), set up under SOX, violates the Appointments Clause and constitutes an unconstitutional delegation of legislative power.[104] Others have tried to invalidate the convictions of white collar criminals by arguing that one of the bases under which they have been convicted, the "honest services" fraud statute,[105] is unconstitutionally vague.[106]

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[99] WILLIAM J. BAUMOL & J. GREGORY SIDAK, TOWARD COMPETITION IN LOCAL TELEPHONY 27 (1994) (citation omitted).
[100] JEAN-JACQUES LAFFONT & JEAN TIROLE, COMPETITION IN TELECOMMUNICATIONS 277 (2000).
[101] HOVENKAMP, *supra* note 75, at 7.
[102] Minda, *supra* note 74, at 1755 (citation omitted).
[103] *See* Lochner v. New York, 198 U.S. 45 (1905).
[104] *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 2378 (2009).
[105] *See* 18 U.S.C. § 1346 (2006) ("For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services.").
[106] *See* United States v. Skilling, 554 F.3d 529 (5th Cir. 2009), *cert. granted*, 130 S. Ct. 393 (2009); United States v. Weyhrauch, 548 F.3d 1237 (9th Cir. 2008), *cert.*

While each of these arguments deserves careful attention, I will focus on what has perhaps been the most audacious, and to date spectacularly successful, argument: treating corporations as "persons" deserving of constitutional rights, most famously with respect to First Amendment protections. The history of this stunning and sweeping grant is entirely unsatisfactory, and dates back to two sentences in the headnote of a Supreme Court opinion from 1886 which simply state that the "court does not wish to hear argument on the question whether the provision of the Fourteenth Amendment to the Constitution. . .applies to these corporations. We are all of the opinion that it does."[107] Perhaps the Court did not "wish to hear argument" on this issue because granting corporations such rights rests on dubious grounds.[108]

After all, corporations are artificial creatures of the state, and they only exist at the whim of the state. The state has already given them "superhuman" powers, such as limited liability and perpetual life.[109] As Justice White observes in his dissent in the famous *First National Bank of Boston v. Bellotti* case:

> Corporations are artificial entities created by law for the purpose of furthering certain economic goals. In order to facilitate the achievement of such ends, special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets are normally applied to them. States have provided corporations with such attributes in order to increase their

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granted, 129 S. Ct. 2863 (2009); United States v. Black, 530 F.3d 596 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2379 (2009).

[107] Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886). As Justice Rehnquist notes, the "Court decided at an early date, with neither argument nor discussion, that a business corporation is a 'person' entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 822 (1978) (Rehnquist, J., dissenting).

[108] *See* John Henry Brebbia, *First Amendment Rights and the Corporation*, 35 PUB. REL. J. 16, 18 (1979) ("Generations of constitutional scholars and Supreme Court Justices have argued that corporations, having no human nature, have no human rights.").

[109] One commentator notes the supervening irony here:

> The corporate drive for constitutional parity with "real" humans comes at a time when legislatures are awarding these artificial persons superhuman privileges. Besides perpetual life, corporations enjoy limited liability for industrial accidents such as nuclear power disasters, and the use of voluntary bankruptcy and other means to dodge financial obligations while remaining in business.

Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 658–59 (1990).

> economic viability and thus strengthen the economy generally. It has long been recognized, however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process.[110]

It would defy logic to argue that the state creating this artificial entity not be able to regulate its speech—a lapse that cannot simply be swept under the rug.

The latest major volley is the Supreme Court's opinion in *Citizens United v. FEC*, where five Justices agreed to declare unconstitutional certain limitations, contained in the McCain-Feingold campaign finance law, on how corporations spend money to support or oppose political candidates.[111] The majority's opinion is problematic in that it seems to pay little attention to the structures that allow private parties to manipulate government. As Amitai Etzioni notes:

> The economic literature is replete with distortions the government causes in the markets. Comparable attention should be paid to manipulations of the government by participants in the market, and the effects of these manipulations on the internal structures of markets. A major way these manipulations are carried out is for corporations, banks, farmers, and labor unions to use their *political* power to significantly and systematically affect the outcomes of market transactions.[112]

One could be forgiven for believing that corporations' success should rest on their business advantages, not on their ability to manipulate government. Not to mention that allowing corporations further into the political process will only exacerbate the existing concern that our representative democracy disproportionately favors monied interests—notwithstanding the reassurance of "one person, one vote."[113] These factors breed cynicism.

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[110] *Bellotti*, 435 U.S. at 809 (White, J., dissenting).
[111] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 50 (2010).
[112] AMITAI ETZIONI, THE MORAL DIMENSION: TOWARD A NEW ECONOMICS 217 (1988).
[113] *See, e.g.*, Stanley Aronowitz, *Against the Liberal State: ACT-UP and the Emergence of Postmodern Politics*, *in* SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS 357, 363 (Linda Nicholson & Steven Seidman eds., 1995) ("The power of capital resides, principally, in the public perception that, in the absence of an alternative economic discourse and plan, corporations . . . hold the economic strings . . . . Almost everybody who counts in political terms accepts the idea that no fiscal program can be *perceived* to hurt business."); Linda Nicholson &

Overly expansive corporate speech thus represents a brilliant attempt to use vast aggregations of money to ward off regulation. But the strategy runs far deeper than speech or the First Amendment. It runs to the Bill of Rights more broadly. As one commentator chronicles:

> [C]orporations and their managers. . .successfully have used the Bill of Rights as a shield against government regulation. Businesses now wield the Bill of Rights in much the same way that the fourteenth amendment was used during the Progressive era when corporations impeded state governmental regulation with constitutional roadblocks. In this sense, the supposedly defunct doctrine of substantive due process—under which the Court imposes its own economic views to strike down regulation—retains surprising vitality. Indeed, the current era can be categorized as one of corporate due process.[114]

The agenda is to use the Bill of Rights to sidestep economic regulation, much like the *Lochner* era relied on Fourteenth Amendment due process claims.

Reform is possible. The most straightforward, though least likely, option would be a constitutional amendment that clarifies once and for all that corporations are not "persons" privy to the protections of the Constitution: created by legislatures, they can only enjoy benefits conferred to them by legislatures.[115]

Short of this broad remedy, and in the wake of *Citizens United*, the single most urgent area for change is likely campaign finance reform.[116]

Steven Seidman, *Introduction*, *in* SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS 1, 31 (Linda Nicholson & Steven Seidman eds., 1995) ("[L]iberal majoritarian politics is threatened by business interests which increasingly dictate public policy—demanding tax breaks or deferment of public investment—by its threat to relocate or significantly reduce their present investments.").

[114] Mayer, *supra* note 109, at 577–78.

[115] *See, e.g.*, *id.* at 660 ("[A] constitutional amendment is needed that declares corporations are not persons and that they are only entitled to statutory protection conferred by legislatures and referendums.").

[116] *See, e.g.*, AMITAI ETZIONI, NEXT: THE ROAD TO THE GOOD SOCIETY xi (2001) ("Can campaign financing be thoroughly reformed, not by our current method of merely closing one floodgate as money gushes over and around the dam and everywhere else, but in a way that will stop the drift toward a plutocracy of one dollar, one vote?"); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 50–51 (1998) ("[I]f the relationship between legislators and regulation-seeking interest groups constitutes the real lynchpin of the public choice theory—then reforms in the area of campaign finance, for one example, might go far to alleviate the problems that lead public choice theorists to call for deregulation.").

Perhaps it might finally be time to consider publicly financing federal election campaigns. In the interim, Congress might prohibit entities receiving federal money, such as federal contractors and bailout recipients, from spending on the electoral process. It could place limits on the ability to deduct the cost of influencing elections, or even impose a tax on monies so spent. Congress could require corporate executives to identify themselves in their advertisements and note their approval of the message contained therein—much like political candidates already have to do. The Securities and Exchange Commission could craft rules requiring publicly-traded corporations to disclose, with specificity and with minimal delay, their political spending. A complementary option would be to require shareholder votes to approve the spending of the corporation's money to influence the political process.

Above all, reform can only begin if citizens begin to ask whether corporations should also benefit from constitutional protections designed to protect individual liberties from majoritarian impulses. Once the logical lapse is scrutinized, the specifics of change can follow.

IV. CONCLUSION

Over the past forty years, we have been seduced by the notion that society can organize its collective economic life simply by having government get out of the way, and allowing private actors to bargain among themselves to achieve an efficient outcome. But this belies the reality that, at the very least, government needs to create an environment where free and open markets can operate in the public interest. As Ronald Coase points out, "for anything approaching perfect competition to exist, an intricate system of rules and regulations would normally be needed."[117] Put simply, such markets do not happen by accident.[118] This is not even to

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[117] R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 9 (1988). Advocates of the laissez-faire, who too often rely on simplistic readings of Coase's work, conveniently forget that in his pathbreaking article, *The Problem of Social Cost*, Coase makes it clear that

> [T]here is no reason why, on occasion, such governmental administrative regulation should not lead to an improvement in economic efficiency. This would seem particularly likely when . . . a large number of people are involved and in which therefore the costs of handling the problem through the market or the firm may be high.

Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 18 (1960).

[118] As Frederic Jameson observes, "to get it right, you have to talk about real markets just as much as about metaphysics, psychology, advertising, culture, representations, and libidinal apparatuses." FREDERIC L. JAMESON, POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM 264 (1991). In the words of one commentator:

mention the important role citizens expect government to play in difficult times. As Stephen Croley observes:

> Americans have repeatedly turned to federal regulatory government in times of crisis to address the country's most stubborn problems—from the banking crises and business corruption of the early twentieth century, through the Great Depression, stock market crisis, and labor unrest of the 1930s and 1940s, through the environmental crisis and civil rights revolutions of the 1960s and 1970s, to the threat of terrorism and the creation of the huge Department of Homeland Security at the beginning of the twenty-first century, to name a few.[119]

Despite this reality, tremendous energy has been spent criticizing government. Unfortunately though, as Ezra Suleiman forcefully argues in his study of the demise of public administration, "The virulent attacks on state bureaucracy . . . have helped to undermine politics, political involvement, and citizenship. They have in the process undermined the democratic polity by delegitimizing themselves and their political functions."[120]

Let us not get so distracted that we forget that the "the critical question is *who* uses the government for *what* ends."[121] The challenge is thus not to abandon government, but to find ways to make it better, to go beyond and "create a regulatory superstructure that encourages the betterment of regulatory technology itself . . . for it is nothing less than the aspiration that

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> Today, the instinctive distrust of any governmental action, and the almost religious faith in free markets, which characterized the deregulatory movement, seem somewhat naïve. There is a growing recognition instead that unregulated markets do not necessarily operate perfectly, that successful, anticompetitive behavior by firms is in fact more plausible and common than we perhaps thought, and the social costs of these phenomena are substantial.

Ashutosh Bhagwat, *Unnatural Competition?: Applying the New Antitrust Learning to Foster Competition in the Local Exchange*, 50 HASTINGS L.J. 1479, 1501 (1999).

[119] STEPHEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 3 (2008).

[120] EZRA SULEIMAN, DISMANTLING DEMOCRATIC STATES 4 (2003). Similarly, John Kenneth Galbraith labels the "massive ideological attack [that] has been mounted on public regulation in and of the economy" as an "escape from thought." JOHN KENNETH GALBRAITH, THE GOOD SOCIETY 76 (1996).

[121] Warren J. Samuels, *Interrelations Between Legal and Economic Processes*, 14 J. L. & ECON. 435, 442 (1971).

government, like all things human, can improve."[122] In improving the relationship between American government and American business, neither defeatism nor effrontery is in order.

[122] John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Technology of Regulation*, 71 U. COLO. L. REV. 1071, 1080 (2000).